Supreme Court, U.S.
FILED
MAY 8 1991
OFFICE OF THE CLERK

No. 90-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HELEN EHRET BACH, EUGENE G. BACH, III and JANET B. LASHLEY,

Petitioners

v.

TRIDENT STEAMSHIP COMPANY, INC., KAISER ALUMINUM AND CHEMICAL CORPORATION,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

ROBERT H. MURPHY
Counsel of Record
KENNETH J. SERVAY
THOMAS D. FORBES
CHAFFE, MCCALL, PHILLIPS, TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Attorneys for Respondents, Trident Steamship Company, Inc. and Kaiser Aluminum and Chemical Corporation

May 8, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

Respondents, Trident Steamship Company and Kaiser Aluminum and Chemical Corporation, disagree with the statement of the question presented by Petitioner. The questions presented for consideration are:

1. Whether the United States Court of Appeals for the Fifth Circuit correctly determined, consistent with this Court's recent opinion in *McDermott International, Inc. v. Wilander*, —— U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), that petitioner's decedent, a land-based, river port pilot, is not a "seaman" entitled to state a claim as such under the Jones Act, 46 U.S.C. app. § 688, or the general maritime law?

2. Whether summary judgment in favor of respondents is appropriate, regardless whether decedent was a seaman, where the uncontradicted evidence demonstrates that petitioners were unable to prove their case by a preponderance of the evidence?

LIST OF INTERESTED PERSONS AND RULE 29.1 LIST

The parties to the proceeding below were petitioners/plaintiffs, Helen Ehret Bach, Eugene G. Bach, III, Janet Bach Lashley, and respondents/defendants, Trident Steamship Company, Inc., the owner of the M/V JAYMAT TRIDENT, and Kaiser Aluminum and Chemical Corporation, the vessel's charterer. Although petitioners named the vessel, the M/V JAYMAT TRIDENT, as a defendant and a respondent, petitioners never seized the vessel. Thus, the vessel was not a party in the courts below and is not a party before this court.

Pursuant to this Court's Rule 29.1, respondent, Trident Steamship Company, Inc., certifies that it is owned by Standard Shipping, Inc. and various individual owners. Trident has no subsidiaries that are not wholly owned.

Pursuant to Rule 29.1, respondent, Kaiser Aluminum and Chemical Corporation, certifies that it is owned by KLU Holdings, Inc. and Brown Brothers, Harriman, & Co. Its subsidiaries that are not wholly owned are as follows: Anglesey Aluminum Limited, Bauxita Da Amazonia Limitada, Delta Holdings, Inc., Hopewell International Insurance, Ltd., Kaiser Jamica Bauxite Company, Oakland City Center Hotel Company, Inc., Queensland Alumina Finance N.V., Queensland Alumina Holdings N.V., Queensland Alumina Limited, Queensland Alumina Security Corporation, Second Queensland Alumina Security Corporation, Tortuga Casualty Company, United Insurance Company, and Volta Aluminum Company, Limited.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

Respondents, Trident Steamship Company, Inc. and Kaiser Aluminum and Chemical Corporation, submit that there is no basis for granting a writ of certiorari in this case. This Court in *McDermott International, Inc. v. Wilander*, —— U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), reviewed and approved the longstanding test applied by the United States Court of Appeals for the Fifth Circuit for defining who is a "seaman" entitled to state a cause of action under the Jones Act, 46 U.S.C. app. § 688. Because the opinion of the Fifth Circuit in this case, consistent with the *Wilander* test, correctly determined that petitioners' decedent was not a seaman, this case does not justify issuance of a writ of certiorari.

Furthermore, petitioners' inability to prove their case by a preponderance of the evidence rendered summary

judgment appropriate whether or not decedent was a seaman. Thus, respondents' factual entitlement to summary judgment negates any legal issue that this case may present and renders this case inappropriate for review by this Court.

STATEMENT OF THE CASE

Petitioners have omitted from their statement many important facts. The opinions below (*see* Petitioners' appendix, A-1 to A-49), while referencing most of the relevant facts, do so throughout the text of three separate opinions. Thus, respondents restate the relevant facts as follows:

On December 26, 1986, petitioners' decedent, Eugene G. Bach, a Mississippi River port pilot (and not a "bar pilot" as petitioners erroneously label him), collapsed and died aboard the M/V JAYMAT TRIDENT shortly after he arrived on the deck of that vessel. Although Bach's death resulted from a serious occlusive coronary artery disease, commonly known as "hardening of the arteries," and could have as easily occurred in his living room as on the vessel, petitioners filed this lawsuit seeking to hold respondents responsible for his death.

A. The Practice of Pilotage under Louisiana Law

Under Louisiana law, "river port pilots" have the exclusive right to provide pilotage services to most vessels on the Mississippi River between New Orleans and Pilottown (at the mouth of the river). *See* La. Rev. Stat. 34:996.[1] The fees charged by the river port pilots are set by regulation. *See* La. Rev. Stat. 34:997, 1121(A), 1122 (A)(1)(a). Masters, owners, and agents of vessels traversing the Mississippi River between New Orleans and Pilottown are required by law to hire a river port pilot

[1] The Louisiana statutes regarding pilotage cited in this opposition are reproduced in the appendix to this writ opposition at 1a to 3a.

or face severe civil and criminal penalties for failing to do so. *See* La. Rev. Stat. 34:1002, 1002.1, 1009. Louisiana law authorizes the river port pilots to form an association. *See* La. R.S. 34:995. As allowed by Louisiana law, the river port pilots have formed and operate out of the Crescent River Port Pilots Association. The Pilots' Association, as was done in this case, assigns one of its member pilots to a vessel when it receives a call from a vessel's master, owner, or agent. A pilot boarding boat then transports the assigned pilot to the oceangoing vessel, whereupon the pilot boards the vessel and then assists in navigating it between the aforementioned points.

Two of the petitioners in this case, Eugene G. Bach, III, decedent Bach's son and a river port pilot like his father, and Mrs. Helen Bach, decedent's wife, testified as to the nature of pilotage as practiced by the river port pilots. Their testimony indicates that pilots are independent contractors and are not part of the crew of any vessel. River port pilots merely sail with a vessel between two points in the Mississippi River. River port pilots have no regular, continuous, or permanent connection with any vessel and leave the vessel before it reaches the Gulf of Mexico. The IRS Form K-1 forwarded to decedent's corporation by the pilots' association indicated that the pilots' association acts as a partnership in passing the income it collects from pilotage fees down to its members. Decedent Bach was a member of the association through his personal corporation. Thus, the pilots' association forwarded the IRS Form K-1 reflecting decedent's corporation's share of the pilotage income to his personal corporation. In turn, decedent's personal corporation employed decedent.

B. The Underlying Facts

One of the normal duties of a river pilot is to reach the deck of vessels to which the pilot is assigned by climbing rope-railed and wooden-stepped pilot ladders. Once the pilot reaches the deck via the pilot ladder, his normal

duties include ascending several flights of stairs to reach the ship's bridge or wheelhouse. Decedent Bach, 61 years old at the time of his death, had been performing such duties for over 30 years.

Early on the morning of December 26, 1986, a pilot boat transported Bach to the M/V JAYMAT TRIDENT. Bach stepped onto the pilot ladder from a platform on the top of the pilot boat and climbed the pilot ladder approximately 21 feet to the ship's deck.[2] He then ascended four flights of stairs from the deck to the vessel's bridge. According to the vessel's deck log, Bach reached the wheelhouse on the ship's bridge at 2:30 a.m. and relieved Pilot Taylor, the Baton Rouge to New Orleans pilot. The record is devoid of any evidence indicating that Bach suffered any injury or had any difficulty reaching the bridge.

Two minutes later, at 2:32 a.m. according to the vessel's log, Bach unexpectedly collapsed and became unconscious while the vessel was in navigation and proceeding down the Mississippi River. The vessel's quartermaster called the vessel's captain, who was standing on the port side bridge wing waiting for Pilot Taylor to descend the pilot ladder. The captain ran to the wheelhouse, where he saw Bach lying on the floor. He ran back to the port wing and yelled for Pilot Taylor to return to the bridge.

Pilot Taylor returned to the bridge and took control of the vessel, which was in an emergency situation. At the request of the vessel's captain, Pilot Taylor called for emergency medical assistance and brought the vessel to

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[2] The summary judgment evidence indicated that the freeboard of the M/V JAMAT TRIDENT, *i.e.*, the distance between the vessel's deck and the surface of the water, was no more than 32.36 feet, and probably was somewhat less. The pilot boat platform from which Bach boarded the vessel was 11 feet, 1½ inches above the water line. Thus, Bach's climb on the pilot ladder was no more than approximately 21 feet.

anchor. Although Pilot Taylor called for medical assistance shortly after his return to the bridge at 2:34 a.m., emergency medical personnel did not arrive until some time after 3:00 a.m. (the deck log lists the time of arrival as 3:30 a.m.). While the vessel was being maneuvered to anchor, a crewmember checked Bach and found no pulse. When paramedics arrived, they checked Bach and also found no pulse. Bach was placed on a stretcher and transported to shore.

C. The Medical Evidence

While petitioners seek to hold respondents responsible for Bach's death, the uncontradicted medical evidence, including the deposition testimony of petitioners' own medical expert, demonstrates that Bach had severe "hardening of the arteries" and would have died regardless of the vessel's actions.

Decedent was transferred from the vessel to the Orleans Parish Coroner's Office, where an autopsy was performed. The Coroner classified decedent's death as "natural," resulting from "severe stenotic calcific coronary atherosclerosis as well as other conditions."

Petitioners' medical expert, Dr. John H. Phillips, the head of cardiology at Tulane University Medical Center, testified by deposition that decedent had occlusive coronary artery disease, commonly known as "hardening of the arteries." Decedent had only "pinpoint lumens" in his arteries, meaning that his arteries were 90 to 99 percent blocked. Dr. Phillips classified decedent's condition at the time of his death as extremely serious. He testified that had he examined decedent before his death, he would have instructed him to stop working and to refrain from physical activity and would have scheduled him for immediate coronary by-pass surgery.

Dr. Phillips explained that Bach's death resulted when the restricted blood flow through the clogged arteries

caused "ventricular fibrillation," that is, "where the electrical activity of the heart, particularly in the ventricles, is so distorted that there is no effective cardiac contraction." As a result, the heart stops pumping. After ventricular fibrillation is present for a few minutes, in some cases only a few seconds, it can only be reversed, and the party can only be saved, by electrical shock treatment using a special medical device known as a defibrillator. Dr. Phillips testified that in more than 90, and probably more than 95 percent of the cases where ventricular fibrillation sets in, a defibrillator is needed to save the party. Dr. Phillips stated that defibrillators are found primarily in hospitals, in some doctors' offices, and possibly in some emergency medical units, and that they are not likely to be equipment aboard an ocean-going cargo vessel.[3]

Dr. Phillips further testified that the more advanced the condition, the less likely the party's chances of survival, even if CPR and electrical defibrillation had been promptly administered. He opined that the majority of persons with decedent's condition would not have survived, even had CPR and electrical defibrillation been promptly administered. Outside a hospital Coronary Care Unit, decedent's chances of survival were extremely slim.

Dr. Phillips also testified that while decedent's activity in climbing aboard the vessel *may* have been a factor in his death, he could not state that decedent would not have collapsed and died if he had not engaged in that activity. Nor could he state that decedent would not have died had he climbed an accommodation staircase rather than a pilot's ladder. Dr. Phillips opined that someone with decedent's severe heart condition could have suffered a heart attack while sleeping, sitting, watching television, or walking; there is no standard precipitating event.

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[3] Furthermore, many emergency medical units are not equipped with electrical defibrillators. The emergency medical unit that responded to the ship's call for help was not so equipped.

He testified that just as many heart attacks occur at rest as during exercise, maybe more.

Dr. Phillips assessed Bach's chances of dying, even if CPR *and electrical defibrillation* had been promptly administered, at 85 percent *or somewhat greater*, with his chances of survival possibly in the 0 to 10 percent range.

D. The District Court Proceeding

Petitioners filed suit in the United States District Court for the Eastern District of Louisiana, alleging that decedent was a seaman and that they were entitled to recover damages under the Jones Act and the general maritime law. They alleged that respondents Trident and Kaiser were negligent and that the M/V JAYMAT TRIDENT was unseaworthy, because the vessel allegedly violated applicable regulations in providing decedent with the customary rope and wooden pilot ladder to board the vessel, rather than an accommodation staircase. Petitioners asserted that respondents were negligent in providing decedent access to the vessel by means of a traditional pilot ladder, because the distance decedent had to climb on the ladder allegedly exceeded the maximum distance prescribed by applicable marine regulations. Petitioners also alleged that respondents were negligent, because the crew failed to administer CPR immediately after decedent's collapse.

Respondents initially brought a summary judgment motion seeking dismissal of petitioners' Jones Act and unseaworthiness claims, asserting that decedent was not a seaman entitled to these remedies. On October 12, 1988, the district court granted respondents' summary judgment motion dismissing these claims. *See* Petitioners' Appendix, A-26 to A-32. It subsequently denied petitioners' "motion for a new trial" on these claims.

Before the district court dismissed petitioners' Jones Act and general maritime law claims, petitioners amended

their complaint to state an alternative claim. They alleged that if decedent were not a seaman, they nevertheless were entitled to recovery for respondents' alleged negligence under Section 5(b), 33 U.S.C. § 905(b), of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Respondents brought a second summary judgment motion seeking dismissal of this claim. The district court granted this motion on March 27, 1989. *See* Petitioners' Appendix, A-34 to A-49. The district court found, as a matter of law, that respondents had not violated any regulation, and thus, were not negligent in providing decedent with the customary pilot's ladder to board the vessel. *Id.*, A-38 to A-43. Regarding petitioners' failure-to-administer-CPR claim, the district court found that under the undisputed facts of the case, *i.e.*, the testimony of petitioners' own medical expert, petitioners could not meet their burden of proving by a preponderance of the evidence that any failure to administer CPR caused decedent's death. *Id.*, A-43 to A-49.

E. The Fifth Circuit's Opinion

On January 10, 1991, the United States Court of Appeals for the Fifth Circuit entered its opinion and judgment affirming the district court's judgment. *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322 (5th Cir. 1991); Petitioners' Appendix, A-1 to A-25. The Court of Appeals, employing its longstanding test first enunciated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), found that decedent, a land-based river pilot, was not a seaman. The court found that while decedent's job as a river pilot contributed to the function or mission of a vessel, decedent had no permanent connection to the vessel or an identifiable fleet of vessels as required to be a seaman. 920 F.2d at 324-26; Petitioners' Appendix, A-2 to A-7.

The appellate court also affirmed the dismissal of petitioners' seaworthiness claim and their LHWCA general negligence claim. 920 F.2d at 326-27; Petitioners' Ap-

pendix, A-8 to A-11. The court found that, in light of the uncontradicted medical evidence discussed above, "no rational factfinder could conclude that the crew's failure to administer CPR more likely than not caused Bach's death." 920 F.2d at 327; Petitioners' Appendix, A-9. The court further found that respondents were not negligent in providing decedent access to the vessel by means of a pilot ladder, because the 21 feet Bach had to climb on the pilot ladder were well within the 30 feet maximum allowed by applicable marine regulations. 920 F.2d at 326-27; Petitioners' Appendix, A-8 to A-9.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF THE FIFTH CIRCUIT AND THE DISTRICT COURT ARE CONSISTENT WITH THIS COURT'S RECENT *WILANDER* DECISION

This term, in *McDermott International, Inc. v. Wilander*, —— U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), this Court considered the conflicting standards employed by the circuits in determining whether a litigant is a seaman entitled to sue under the Jones Act, 46 U.S.C. app. § 688 *et seq.* In *Wilander*, a Fifth Circuit case like the present case, the courts below applied the longstanding test of *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), in finding that Wilander, an oilfield worker assigned to paint a boat working in the Persian Gulf, was a seaman. Under the *Robison* test, as developed by the Fifth Circuit, a party is considered a seaman if: (1) he or she is permanently attached to or performs a substantial part of his or her work aboard a single vessel or an identifiable fleet of vessels *and* (2) if the party's employment contributes to the function or mission of the vessel or an identifiable fleet of vessels. *Wilander*, 111 S.Ct. at 809.

However, McDermott, the petitioner in that case, alleged that a mere contribution to the function or mission of the vessel did not render the party a seaman. Mc-

Dermott argued that the correct test for determining whether a party is a seaman is the stricter test applied by the Seventh Circuit in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). *Wilander*, 111 S.Ct. at 809-10. Under the *Johnson* test, to be classified as a seaman, a party's employment must make "a significant contribution to the maintenance, operation or welfare of the transportation function of the vessel," and not merely the general function or mission of the vessel. *Wilander*, 111 S.Ct. at 810, *quoting Johnson*, 742 F.2d at 1063.

Thus, the specific question addressed by this Court was "whether one must aid in the navigation of a vessel in order to qualify as a 'seaman' under the Jones Act." *Wilander*, 111 S.Ct. 809. Weighing these two inconsistent requirements, this Court, agreeing with the Fifth Circuit test, held that seaman's status does not require that the party contribute to the *transportation* function of the vessel. 111 S.Ct. at 817.

However, in resolving this question, this Court delineated the other elements necessary for a party to be considered a seaman. The Court extensively examined the Jones Act and the LHWCA and their interpreting jurisprudence. *Id.*, 111 S.Ct. at 810-17. The Court explained that the purpose of the LHWCA was to remove from the scope of Jones Act coverage land-based maritime workers, while leaving as seamen sea-based maritime employees. *Id.*, 111 S.Ct. at 813-14. The Court concluded that the phrase, "master or member of a crew," as used in the LHWCA exemption from coverage "restates who a 'seaman' under the Jones Act is supposed to be: a sea-based maritime employee." *Id.*, 111 S.Ct. at 814.

In addition to recognizing that the Jones Act requires a party claiming the status of a seaman to be a "sea-based" maritime employee, and not a "land-based" employee, this Court also recognized another mandatory requirement of seaman's status: the party must owe his

or her allegiance to a vessel at sea—*not to a land-based employer*. *Id.*, 111 S.Ct. at 813-14, 817. The Court emphasized that the "key" factor in determining seaman's status is whether the party has an employment-related connection to a vessel in navigation. *Id.*, 111 S.Ct. at 817.

Thus, in holding that a seaman (1) must be sea-based and not land-based and (2) must have an employment-related connection to a vessel, this Court identified the same factors as did the Fifth Circuit in *Robison*: a seaman must have a permanent attachment to a vessel or perform substantial work aboard a vessel or, at the very least, aboard an identifiable fleet of vessels. *Robison*, 266 F.2d at 779. The seaman's status test established in *Wilander* essentially is no more than a restatement of the *Robison* test applied by the Fifth Circuit in this case.

While the circuits may have disagreed regarding the "aid in the transportation function of the vessel" requirement, there is no disagreement regarding this "permanent attachment to a vessel" requirement. Consistent with *Wilander* and the Fifth Circuit *Robison* test, all other circuits that have considered the issue have held that, for a party to be considered a seaman, the party must have a permanent connection with a vessel. *E.g.*, *Stafford v. Perini Corp.*, 475 F.2d 507, 510-11 (1st Cir. 1973); *Klarman v. Santini*, 503 F.2d 29, 33 (2d Cir. 1974), *cert. denied sub nom. Connecticut v. Klarman*, 419 U.S. 1110 (1975); *Griffith v. Wheeling Pittsburg Steel Corp.*, 521 F.2d 31, 36 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Whittington v. Sewer Construction Co., Inc.*, 541 F.2d 427, 434 (4th Cir. 1976); *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 737 (6th Cir. 1986); *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1062-63 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505, 510 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521,

523 (9th Cir. 1989); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504, 505 (11th Cir. 1990).

There is no basis for granting a writ in this case. The Fifth Circuit's decision does not conflict with this Court's *Wilander* decision as argued by petitioners. The Fifth Circuit's decision, finding decedent not to be a seaman, was based on the uniformly agreed-upon requirement that seaman's status requires that the party have a permanent connection with a vessel, or at the very least, with an identifiable fleet of vessels. As the Fifth Circuit stated, "Bach's survivors do not seriously argue that he was permanently attached to or did substantial work on board the M/V JAYMAT TRIDENT. The record clearly reveals that he fulfilled neither requirement." 920 F.2d at 324; Petitioners' appendix, A-3.

The *uncontradicted* evidence in this case supports the Fifth Circuit's conclusion. Decedent had no employment connection to the vessel or its owner or charterer. Rather, he was an employee of his personal corporation, which received its share of the pilotage fees forwarded to it by the pilots' association. Decedent was not aboard the vessel as a matter of the vessel owner's choice. Rather, he was aboard, because Louisiana law requires a pilot to be aboard and severely penalizes any vessel owner who fails to use a river port pilot who offers his services. *See* La. Rev. Stat. §§ 34:1002, 1002.1, 1009. Two of the three petitioners in this case, decedent's widow, Helen Bach, and decedent's son, Eugene G. Bach, III (who, like his father, is a river pilot), testified in their respective depositions, that decedent had no permanent connection with any vessel. Decedent's son testified that river port pilots merely assist a vessel between two points in the Mississippi River. He further testified that river port pilots have no regular, continuous, or permanent connection with any vessel, and that they leave the vessel before it reaches the Gulf of Mexico. Decedent's wife *agreed* that river port pilots *are not members of any vessel's crew*. Finally,

there is no evidence in this case that decedent had any permanent connection with any identifiable fleet of vessels owned or controlled by respondents. Rather, decedent simply engaged in river port pilotage as an independent contractor on random vessels as assigned by the pilots' association.[4]

Thus, petitioners' own testimony verifies the correctness of the Fifth Circuit's decision. This case is squarely governed by the seaman's status test recognized in *Wilander*. Decedent *cannot* be a seaman because petitioners' own testimony established that decedent lacked the "permanent connection to a vessel" requirement recognized by this Court in *Wilander* and recognized by every circuit that has addressed the issue. Thus, petitioners could not meet their burden of proof regarding a material requirement of seaman's status.

Summary judgment in favor of the defendants is appropriate where plaintiffs fail to demonstrate at least the existence of a question of fact regarding a material element upon which plaintiffs would bear the burden at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986). The courts below correctly sustained respondents' summary judgment motion. This case provides no important question for this Court's review.

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[4] This Court has recognized the independence of pilots and their want of allegiance to any employer:

> Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties.

Bisso v. Inland Waterways Corp., 349 U.S. 85, 93-94 (1955) (footnotes omitted).

II. THIS COURT SHOULD REFUSE TO ESTABLISH ANY EXCEPTIONS TO THE "PERMANENT CONNECTION TO A VESSEL" REQUIREMENT

As discussed above, every circuit that has considered the question has held that seaman's status requires the party to have a permanent connection to a vessel, or at the very least, to an identifiable fleet of vessels under a common control. In *Wilander*, this Court acknowledged this requirement. Petitioners contend that this Court should carve an exception into this requirement for river port pilots like decedent. *See* Petitioners' Petition, 6-12. Petitioners cite *United States v. Thompson*, 28 F. Cas. 102 (C.C.D.Mass. 1832) (No. 16,492) and *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852) for the proposition that pilots have always been considered seamen. *See* Petitioners' Petition, 8-9. Petitioners further argue that pilots should be considered seamen, because their job is inconsistent with other workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, and because a 1927 LHWCA administrative interpretation opined that pilots were not covered by that act. *See* Petitioners' Petition, 10-12. Petitioners argue that this Court has granted a writ of certiorari in *Gizoni v. Southwest Marine Inc.*, 909 F.2d 385 (9th Cir. 1990), *cert. granted in part*, 111 S.Ct. 1071, 59 U.S.L.W. 3577, 3581 (U.S. Feb. 25, 1991), and that this case would be a good companion case to *Gizoni*. Petitioners' arguments provide no basis for granting a writ.

First, the two cases petitioners rely upon in classifying pilots as seamen are inapposite and do not address the question. *Wilander* has held that the Jones Act and the LHWCA provide the basis for determining who is a seaman. *Id.* 111 S.Ct. at 814-17. Both *Thompson* and *Cooley* were decided in the 19th Century, long before passage of the Jones Act and the LHWCA. Furthermore, neither case contains any analysis of the requirements for seaman's status, even outside the context of the Jones Act

and the LHWCA.[5] Neither case addressed the personal injury recovery rights of one claiming to be a seaman. Thus, neither case addresses the mutually exclusive provisions of the Jones Act and the LHWCA—the two statutory enactments that this Court has held define seaman's status. *See Wilander*, 111 S.Ct. at 814-17.

Second, the LHWCA provides no basis for classifying pilots as seamen. The plain language of that Act does not limit covered workers to longshore workers, but broadly classifies covered employees as "any person[s] engaged in maritime employment" who are not within an exception to the Act's coverage. 33 U.S.C. § 902(3). Decedent, as a river pilot, clearly was engaged in "maritime employment." While Section 902(3)(G) excludes from the Act's coverage "a master or member of a crew of any vessel," a river port pilot cannot fall within that category. *Wilander*, consistent with every circuit court that has addressed the question, has held that the LHWCA phrase, "master or member of a crew of any vessel," has the same meaning as the term "seaman" as used in the Jones Act. *Wilander*, 111 S.Ct. at 814,817. Decedent cannot fit within the definition of a seaman because he did not meet the "permanent connection to a vessel" requirement recognized by *Wilander* and every circuit that has addressed the issue. Thus, because decedent could not qualify as a seaman, decedent could not be within the "master or member of a crew" exclusion from LHWCA coverage. Accordingly, decedent necessarily was a maritime worker covered by the LHWCA. Any other ruling would conflict with the express mandate of *Wilander*.

Furthermore, river port pilots are independent contractors and land-based workers who board innumerable vessels for a few hours at a time. They have no permanent connection to any vessel or identifiable fleet of ves-

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[5] *Cooley* questioned the constitutionality of a Pennsylvania's statutory compulsory pilotage scheme for the Port of Philadelphia. *Thompson* involved a criminal mutiny charge against a crewmember.

sels. The Fifth Circuit's decision is consistent with this Court's mandate in *Wilander* that the LHWCA, not the Jones Act, covers such land-based maritime workers who owe no allegiance to a vessel. *Wilander*, 111 S.Ct. at 813-14.

Third, the 1927 LHWCA administrative interpretation of "master or member of a crew of any vessel" cited by petitioners provides no basis for classifying decedent as a seaman. In that opinion, Longshoremen's Act, Opinion No. 22 (1927), *reprinted at* 1928 A.M.C. 263-64, the United States Employees Compensation Committee, relying on a number of 19th Century cases noting a pilot's status a master *pro hac vice* while aboard the vessel, opined that a pilot was within the "master or member of a crew" exception to LHWCA coverage. *Id.*

Statutory interpretation should begin and end with the plain language of the statute unless the statutory language is unclear. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984). Furthermore, administrative interpretations are not entitled to deference when a sound judicial analysis finds a contrary reading of the statute as supported by statutory language, purpose, and history:

> . . . the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of the major policy decisions properly made by Congress." . . . [The courts] must not "rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983), *quoting American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 318 (1965) and *National Labor Relations Board v. Brown*, 380 U.S. 278, 291-92 (1965).

The cited administrative opinion directly conflicts with *Wilander*. It considered jurisprudence that pre-dated both the LHWCA and the Jones Act. Furthermore, it pre-dated the 1972 amendments to the LHWCA, wherein Congress clearly delineated the mutual exclusivity of the Jones Act and the LHWCA by barring land-based maritime workers from asserting "unseaworthiness" claims. *Wilander*, 111 S.Ct. at 813-14. Most importantly, that administrative opinion did not consider that the phrase, "master or member of a crew," as used in the LHWCA is the same as the term "seaman" as used in the Jones Act. *Wilander*, 111 S.Ct. at 814, 817. Accordingly, that administrative interpretation does not consider whether a pilot has the "permanent connection to a vessel" needed to come within this exclusion. That administrative interpretation directly conflicts with the Jones Act, the LHWCA, and this Court's interpretation of those Acts in *Wilander*, and is not entitled to any deference.

Fourth, this case differs from *Gizoni* and would not make a good companion case. In *Gizoni*, the injured party was a ship repairman—a person specifically covered by the language of the LHWCA—who performed much of his work aboard work barges owned by his employer. 909 F.2d at 387. Gizoni asserted that since he performed a substantial amount of his work aboard his employer's work barges, he was a seaman. *Id.* The district court granted the motion for summary judgment brought by Gizoni's employer, finding that Gizoni was a worker covered by the LHWCA, and not by the Jones Act. *Id.* The Ninth Circuit reversed, finding that a jury question existed regarding whether Gizoni was a seaman, despite the fact that Gizoni's employment as a ship repairer was specifically covered by the LHWCA. *Id.*, 909 F.2d at 387-89. This Court granted a writ of certiorari limited to the question whether employees in occupations specifically covered by the express language of LHWCA are entitled to a jury trial to determine their status as seamen. 59 U.S.L.W. 3577.

This Court appropriately granted a writ in the *Gizoni* case, because that case cannot clearly be decided under the principles announced in the *Wilander* decision. Gizoni was a ship repair employee expressly covered by the LHWCA. Nevertheless, because Gizoni performed much of his work aboard vessels owned or controlled by his employer, he arguably had the permanent connection to a vessel required by *Wilander* to qualify as a "seaman." Thus, this Court correctly granted a writ to clarify the status of such workers.

The present case, however, is governed squarely by principles announced by *Wilander* and agreed upon by the circuits. Unlike Gizoni, decedent Bach clearly cannot be considered a seaman, because the evidence in this case demonstrates that decedent had no permanent connection to any vessel or fleet of vessels. Decedent Bach was a self-employed river port pilot having no permanent connection to any vessel. Thus, decedent squarely fits within the class of maritime workers not covered by the definition of seaman recognized in *Wilander*. While the writ grant in *Gizoni* was necessary to clarify the status of a large group of workers not clearly defined by the *Wilander* decision, granting a writ in this case would not aid in the development of the law.

Finally, sound policy reasons dictate that this Court make no exceptions to the qualifications for seaman's status. As the Fifth Circuit correctly noted, several classes of workers who more clearly face the perils of the open sea than did decedent have been denied status as seamen, because they did not meet the seaman's status requirements. 920 F.2d at 325. Workers, such as those who navigate a vessel on the open seas on sea trials, who work aboard fixed structures on the open sea, and who service vessels at sea owned by various owners, have not been considered seamen, because they lack the permanent connection to a vessel or fleet of vessels that seaman's status requires. *Id.* Making an exception for river port pilots will open the door to classifying innumerable offshore and inland maritime workers who also lack "a permanent con-

nection to a vessel" as seamen. To make the exception urged by petitioners is to "muddy the waters" clarified by *Wilander* as to the qualifications of seaman's status.

In *Wilander*, this Court resolved the principal dispute between the circuits regarding the qualifications for seaman's status. The decision of the Fifth Circuit clearly is consistent with the principles announced in that case. This Court should deny petitioners' request for a writ of certiorari.

III. RESPONDENTS' ENTITLEMENT TO SUMMARY JUDGMENT ON CAUSATION AND BURDEN OF PROOF GROUNDS RENDERS THIS CASE INAPPROPRIATE FOR REVIEW

Finally, this case is inappropriate for review, because the facts obfuscate the legal issue upon which petitioners seek review. This case is not an appropriate one for deciding whether to create an exception to the clear seaman's status requirements, because respondents were entitled to summary judgment whether or not decedent was a seaman.

Whether a plaintiff's claim is under the Jones Act or the general maritime law, a plaintiff seeking recovery must prove *by a preponderance of the evidence* that the fault of the defendant caused the plaintiff's purported injury. *E.g., Diebold v. Moore McCormack Bulk Transport Lines*, 805 F.2d 55, 58 (2d Cir. 1986) (recognizing that plaintiff must prove the elements of his Jones Act case by a preponderance of the evidence); *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1092 (5th Cir. 1988) (noting that both under Texas law and the Jones Act, plaintiff must prove his case by a preponderance of the evidence); *Litherland v. Petrolane Offshore Const. Services*, 546 F.2d 129, 132 (5th Cir. 1977) (affirming a jury instruction requiring plaintiff to prove the elements of his Jones Act case by a preponderance of the evidence); *Matter of Hechinger*, 890 F.2d 202, 208 (9th Cir. 1989), *cert. denied sub nom. Caskie v. Hechinger*, 111 S.Ct. 136 (1990) (citing *Litherland* and recognizing that plaintiff's burden

under the Jones Act is to prove his case by a preponderance of the evidence).

Furthermore, summary judgment is appropriate where the uncontradicted evidence demonstrates that plaintiff is unable to prove his case by a preponderance of the evidence. *Celotex, cited above*, 477 U.S. at 322-23. The mere existence of a "metaphysical doubt" as to material facts does not preclude summary judgment. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A dispute is not genuine so as to render summary judgment inappropriate unless the evidence is such that a reasonable fact finder could return a verdict on the issue for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986).

In this case, petitioners alleged that defendants were negligent in two respects: (1) in failing to administer CPR to decedent immediately upon his collapse, and (2) in allegedly requiring him to climb a pilot ladder for a distance greater than allowed by applicable regulations. However, the undisputed evidence, summarized above, plainly demonstrated that petitioners could not prove either claim by a preponderance of the evidence. Petitioners' own expert physician, Dr. John H. Phillips, the head of cardiology at Tulane University Medical Center, testified that the cause of decedent's death was his hardening of the arteries—arteries that were 90 to 99 percent blocked—not any negligence of the vessel. Dr. Phillips placed decedent's chances of dying from his heart condition, even if CPR and electrical defibrillation had been administered immediately, as *greater than 85 percent, with his chances of survival possibly in the 0 to 10 percent range.* Dr. Phillips further testified that decedent's chances of dying were just as likely whether he was climbing aboard a ship, sleeping, or sitting in his living room while watching television. Thus, petitioners could not meet their burden of proving by a preponderance of the evidence that any alleged negligence caused decedent's death. Furthermore, petitioners' pilot ladder claim totally lacked merit, because the distance decedent climbed up

the ladder was well within the distance allowed by applicable maritime regulations. *See Bach*, 920 F.2d at 327; Petitioners' Appendix, A-8 to A-9.

Because petitioners could not prove their case by a preponderance of the evidence, respondents clearly were entitled to summary judgment. Because respondents were entitled to summary judgment whether or not decedent was a seaman, this case is not an appropriate case to consider whether an exception should be made to the seaman's status test announced in *Wilander*.

CONCLUSION

The decision of the Fifth Circuit is consistent with the requirements for seaman's status enunciated by this Court in *Wilander*. Furthermore, this case is inappropriate for review, because respondents were entitled to judgment, whether or not petitioners' decedent was a seaman. For the reasons discussed above, respondents, Trident Steamship Company, Inc. and Kaiser Aluminum and Chemical Corporation, respectfully submit that this Court should deny petitioners' petition for a writ of certiorari.

Respectfully submitted,

ROBERT H. MURPHY
Counsel of Record
KENNETH J. SERVAY
THOMAS D. FORBES
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Attorneys for Respondents,
Trident Steamship Company,
Inc. and Kaiser Aluminum
and Chemical Corporation

May 8, 1991

APPENDIX

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R.S. 31:995. Association of river port pilots

The said river port pilots may form themselves into an association as to them may seem fit, not in conflict with law, or with the rules and regulations of the river port pilot commissioners, but nothing herein shall affect any association presently existing.

R.S. 31:996. Operating territory

A. The river port pilots shall have the exclusive right to pilot vessels on the Mississippi River between New Orleans, Louisiana and Pilottown, Louisiana and within the Port of New Orleans between Southport and Meraux-ville; within the Industrial Canal, between the Mississippi River to and including Lake Pontchartrain; within the Intracoastal Canal, between the Industrial Canal and the turning basin at Michoud, inclusive; also for the Mississippi River Gulf Outlet between the Industrial Canal and Mile 28.3, the Gulf Intracoastal Waterway from the Louisiana-Mississippi state line to the Mississippi River Gulf Outlet, including Michoud Slip and Michoud Canal, Chef Pass, Algiers Cutoff, and the Harvey Canal; the Venice Jump within six and one-half miles of the Mississippi River, Bayou Sauvage; and Bayou Liberty.

B. However, nothing herein contained shall prevent an exchange of river port pilots at what is known as "Quarantine Anchorage" or "The Point" or "General Anchorage" between the river port pilots herein named and the pilots engaged in the piloting of vessels above Southport, nor shall anything herein provided prevent pilots engaging in piloting vessels above Southport from ending or beginning the pilotage from any wharf or "The Point" or "General Anchorage" in the Harbor of New Orleans.

R.S. 34:997. Pilotage fees; vessel subject to pilotage

A. The river port pilots shall be entitled to ask for and to receive a fee for their pilotage services.

B. The fees for pilotage services shall be established in accordance with R.S. 34:1121, *et seq.*

C. The river port pilots shall also be entitled to enter into agreements with the masters, owners, or their agents, of ships and vessels, not otherwise subject to compulsory pilotage as provided by these statutes, for special services, boats, equipment, transportation, and other necessary fees at such rates and for such sums as may be agreed between them, but not to exceed those rates established in accordance with R.S. 34:1121, *et seq.*

D. All vessels shall employ a river port pilot when navigating the operating territory described in this Subpart except those vessels exempted by the laws of the United States or vessels of one hundred gross tons or less.

E. In case of refusal to take such river port pilot, the master, owner, agent, or consignee of any vessel required to employ a river port pilot shall pay the established pilot fee as if a river port pilot had been employed.

R.S. 34:1002. Violations and penalties

Anyone attempting to exercise the functions herein vested in the said river port pilots, who has not been commissioned by the governor, shall be fined not less than one thousand five hundred dollars, nor more than five thousand dollars, or imprisoned not less than thirty days, nor more than four months, or both, at the discretion of the court in whose jurisdiction the offense is committed.

R.S. 34:1002.1. Employing pilot without a state commission; penalties

A. No master, owner, or agent of a vessel required under this Subpart to take a state commissioned river port pilot

shall perform the duties of a river port pilot nor employ a person who is not a state commissioned river port pilot.

B. Whoever violates this Section shall be fined not less than one thousand five hundred dollars nor more than five thousand dollars, or imprisoned for not more than six months, or both.

R.S. 34:1009. Employing pilot without a commission; liability of vessel, master, and owner

A vessel which is required to use a river port pilot pursuant to this Subpart and fails to do so when a river port pilot offers his services, the vessel, its captain, and owners shall be liable for a civil penalty and shall forfeit to the state of Louisiana the sum of fifteen thousand dollars, with privilege on the vessel, to be recovered before any court of competent jurisdiction. An action for forfeiture under this Section may be brought by the attorney general of the state of Louisiana or by the Board of River Port Pilot Commissioners. If a judgment is obtained hereunder, the court shall include in its judgment an award for reasonable attorney fees and costs incurred in connection with the prosecution of such action.

R.S. 34:1121. Pilotage fee commissions; composition

A. A separate pilotage fee commission shall exist relative to each pilot association established and operating under state law. Each pilotage fee commission shall be nominally designated by the name of the association to which it relates, followed by "Fee Commission".

* * * *

R.S. 34:1122. Fees and charges; adjudication of disputes

A. (1) Each fee commission shall have exclusive authority to fix and establish reasonable and just fees and rates for:

(a) Pilotage service to ships and vessels.

* * * *